Supreme Court U.S.
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No. 02-830

IN THE

Supreme Court of the United States

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES,

Petitioner,

v.

THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the duty to "exert every reasonable effort to make and maintain agreements . . . and to settle all disputes . . . in order to avoid any interruption to commerce" under Section 2 First of the Railway Labor Act ("RLA"), 45 U.S.C. 152 First, may require a union to give advance notice prior to engaging in strikes, when the union has a unique, admitted, long-standing, and on-going practice of engaging in surprise strikes, notwithstanding the fact that such strikes have repeatedly and invariably been deemed illegal under the RLA.

LIST OF PARTIES AND RULE 29 LIST

The parties to this proceeding are the petitioner Brotherhood of Maintenance of Way Employes and the following respondents (with parent companies and nonwholly owned subsidiaries):

1. The Burlington Northern and Santa Fe Railway Company

   Burlington Northern Santa Fe Corporation

2. Consolidated Rail Corporation

   Conrail, Inc.

   CSX Corporation

   Norfolk Southern Corporation

3. CSX Transportation, Inc.

   CSX Corporation

4. Kansas City Southern Railway Company

   Kansas City Southern Industries, Inc.

5. Norfolk Southern Railway Company

   Norfolk Southern Corporation

6. Union Pacific Railroad Company

   Union Pacific Corporation

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Petitioner,

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THE BURLINGTON NORTHERN & SANTA FE RAILWAY COMPANY, CONSOLIDATED RAIL CORPORATION, CSX TRANSPORTATION, INC., KANSAS CITY SOUTHERN RAILWAY COMPANY, NORFOLK SOUTHERN RAILWAY COMPANY, AND UNION PACIFIC RAILROAD,

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RESPONDENTS' BRIEF IN OPPOSITION

STATUTE INVOLVED

This case primarily concerns Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, which is quoted at page 2 of the Petition and attached hereto in Appendix A. This case also implicates Section 3 of the Railway Labor Act, 45 U.S.C. § 153, which is also reproduced in Appendix A.

STATEMENT OF THE CASE

Section 2 First of the Railway Labor Act ("RLA") requires carriers and their employees to "exert every reasonable effort" to "settle all disputes . . . in order to avoid any interruption to commerce." 45 U.S.C. § 152 First. Federal courts may enforce Section 2 First "by whatever appropriate means might be developed on a case-by-case basis," including injunctions that limit strikes by organized labor. *Chicago & North Western Ry.* v. *UTU*, 402 U.S. 570, 577 (1971).

Notwithstanding the obligation to try to resolve labor disputes without strikes, the BMWE – alone among the thirteen major railroad unions – has repeatedly disrupted operations on the nation's freight railroads with secretly planned strikes over the last decade, causing widespread and irreparable injury to the railroads, their customers, and the public. Federal courts have issued no less than eighteen injunctions against illegal strikes by Petitioner since 1993, including four between January 2000 and March 2001. But because Petitioner's practice is to strike without warning, the railroads and the public have been exposed to these disruptions until a court could enter an emergency restraining order.

Faced with this continuing threat of disruptions and lacking any other remedy, the nation's largest freight railroads sought an injunction in the United States District Court for the Northern District of Texas requiring Petitioner to give advance notice before it engages in strikes. Advance notice of planned strikes is, the railroads argued, a "reasonable effort" required by Section 2 First of the RLA, especially when the striking union has been so demonstrably and consistently wrong in the past about the legality of its behavior.

Upon a review of both the history of injunctions against Petitioner and various express admissions by Petitioner's officers, the District Court found that this union has

an ongoing practice of engaging in illegal strikes without warning. The District Court held that, in these circumstances, an injunction requiring ten days advance notice of strikes is an appropriate and effective means of enforcing Section 2 First. *Burlington Northern & Santa Fe Ry.* v. *BMWE*, 143 F. Supp. 2d 672, 694-95 (N.D. Tex. 2001).

The Fifth Circuit affirmed. It agreed that Petitioner had violated Section 2 First by engaging in a "deliberate policy of repeatedly calling surprise strikes," all of which were deemed unlawful. Pet. App. B at 6a.

The Court of Appeals rejected Petitioner's argument that Section 2 First has no application to surprise strikes. It noted that Section 2 First imposes a "comprehensive[]" duty to "'exert *every* reasonable effort . . . to settle *all* disputes . . . in order to avoid *any* interruption to commerce or to the operation of any carrier.'" *Id.* at 5a-6a (quoting 45 U.S.C. § 152 First). The Court concluded that Petitioner's policy of surprise strikes violates that obligation because striking by surprise makes it "difficult or impossible to resolve the underlying dispute between labor and management without 'interruption to commerce.' Because management is unaware that a strike is impending, it cannot take steps that might prevent it." *Id.* at 6a (citation omitted).

The Court of Appeals expressly noted that it was not deciding whether Section 2 First prohibits *all* surprise strikes. Rather, the Court limited its holding to the unique set of facts posed by this case – a union with a well-established practice and policy of engaging in systematic surprise strikes and a determination to continue this practice notwithstanding the fact that the union is invariably wrong in its belief that the strike is legally justified. *Id.* at 8a-9a, 11a.

In dissent, Judge Duplantier maintained that Section 2 First does not clearly provide a basis for a notice injunction,

even in the face of the kind of egregious illegal behavior exhibited by Petitioner. *Id.* at 17a-18a. He did not agree that the broad language of Section 2 First leaves it to courts to develop and apply the duty of "reasonable efforts" on a case-by-case basis.

The Court of Appeals subsequently denied the Petitioner's suggestion for rehearing *en banc*.

REASONS FOR DENYING THE WRIT

The decision below does not raise any important issue of federal law that has not already been settled by this Court, nor does it conflict with any decision of this Court (or any decision of the courts of appeals). Rather, it turns on the application of well-established principles to particular and unusual facts. Indeed, this case presents the unique circumstance posed by a union that insists on striking by surprise, notwithstanding a track record of being consistently wrong about the legality of its actions. Accordingly, the petition for certiorari should be denied.

I. THE PANEL'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT REGARDING SECTION 2 FIRST OF THE RAILWAY LABOR ACT

Petitioner's principal argument is that various decisions of this Court establish a narrow interpretation of Section 2 First and prescribe a very limited role for courts under the RLA. Pet. at 8-15. In other words, Petitioner argues that there is no judicial remedy under the RLA for a pattern of surprise strikes, even if such strikes are always subsequently enjoined as unlawful.

Petitioner cannot establish and indeed does not contend for the existence of an actual conflict between the

decision below and decisions of this Court. Instead, it contends only that the panel's decision is inconsistent with the direction and tone of this Court's decisions construing Section 2 First. As we now show, however, the Court's precedents plainly support the ruling below that Section 2 First is an enforceable obligation that may serve as the basis for an injunction requiring advance notice of strikes in appropriate circumstances.

A. *Chicago & North Western*

The seminal decision regarding the scope and proper interpretation of Section 2 First is *Chicago & North Western Railway* v. *UTU*, 402 U.S. 570 (1971). There, as here, the union argued that Section 2 First did not impose any legal obligations, but rather was a "mere exhortation." *Id.* at 574. This Court disagreed, holding that

> "[Section] 2 First was intended to be more than a mere statement of policy or exhortation to the parties; rather, it was designed to be a legal obligation, enforceable by whatever appropriate means might be developed on a case-by-case basis." *Id.* at 577.

The Court went on to rule that courts may use injunctions to enforce Section 2 First when it is appropriate, practical, and effective to do so. *Id.* at 577, 582. It remanded to allow the district court to decide whether to issue a strike injunction. *Id.* at 584.

Nevertheless, Petitioner argues that *Chicago & North Western* "described a limited reading of Section 2 First . . . and the scope of judicial action permitted." Pet. at 11. The union points to language in that decision discussing the need for "circumspect[ion]" in enforcing Section 2 First because of the risk of "freewheeling judicial interference in labor relations." *Id.* at 12, quoting *Chicago & North Western*, 402 U.S. at 583. It concludes that Section 2 First should be enforceable only in

situations where one side or the other is refusing to bargain in good faith.

But *Chicago & North Western* clearly held that courts have the flexibility to enforce Section 2 First as appropriate on a case-by-case basis. Nothing in that decision limited the Section 2 First duty of "reasonable efforts" to a duty to bargain in good faith. Moreover, the warning against "judicial interference in labor relations" when enforcing Section 2 First has no application here. *Id.* at 583. This Court was speaking of the risk that judges – if asked to review the parties' conduct in bargaining – might impose their own views about what the terms of a collective bargaining agreement should be. *Id.* at 579 n.11. This is obviously not a case where the enforcement of Section 2 First invites any such meddling in the substantive terms of agreements or judicial second-guessing of bargaining positions.

B. *Burlington Northern*

Petitioner's reliance on the decision in *Burlington Northern Railroad* v. *BMWE*, 481 U.S. 429 (1987) is likewise misplaced. That case held that Section 2 First does not bar secondary picketing by a union that has fully exhausted the RLA's "major dispute" procedures. Petitioner extrapolates from this proposition that courts may *never* infer limitations on strikes from the language of Section 2 First because Section 2 First is not a "basic command" of the RLA. Pet. at 10, 13.

The critical fact in *Burlington Northern*, however, was that the union engaged in secondary picketing had exhausted the major dispute procedures of the RLA. This Court reasoned that Section 2 First does not limit secondary picketing after exhaustion of these procedures because "the availability of such self-help measures as secondary picketing may increase the effectiveness of the RLA in settling major disputes by creating

an incentive for the parties to settle prior to exhaustion of the statutory procedures." 481 U.S. at 451-52.

In this case, by contrast, there has been no exhaustion of *any* statutory procedures by Petitioner. Indeed, the notice injunction is necessary precisely because the Petitioner insists on striking instead of using the procedures of the RLA, despite its seeming inability to correctly ascertain the lawfulness of such behavior. Thus, far from constituting a restriction on a union that has fully complied with the dispute resolution procedures of the RLA, the equitable relief in this case simply allows those procedures to operate as intended.[1]

Moreover, even if one ignores this crucial difference between *Burlington Northern* and this case, the holding in *Burlington Northern* that secondary picketing is sometimes permissible says nothing about whether the RLA may, in appropriate circumstances, require advance notice of strikes. It is entirely consistent to say that giving prior notice of strikes under the facts of this case is a "reasonable effort," but refraining from all secondary picketing is not.

C. Decisions Prior to Chicago & North Western

Finally, Petitioner cites a series of decisions that contain language supposedly prescribing a limited role for courts under the RLA. Pet. at 10, 14-15. But most of those

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[1] Because it aids and preserves the mandatory arbitral process established by Section 3 of the RLA, the notice injunction issued in this case clearly serves to uphold the "basic commands" of the RLA, even beyond the fundamental duty to "exert every reasonable effort" found in Section 2 First. The bargain of the RLA was that unions would give up the right to strike in exchange for guaranteed, binding arbitration under Section 3. As this Court recognized in *BRT* v. *Chicago River & Indiana Railroad.*, 353 U.S. 30 (1957), that bargain is negated if the union is free to strike first, arbitrate later.

decisions predated *Chicago & North Western*, which could not have been clearer that courts may enforce Section 2 First by injunction when it is "practical" and "appropriate" to do so. 402 U.S. at 577, 582. Indeed, *Chicago & North Western* expressly disavowed the passage in the *General Committee of Adjustment* decision[2] on which Petitioner relies, *id.* at 577-78, and pointed out that the *Virginian Railway* decision[3] actually affirmed an injunction requiring compliance with the strict terms of Section 2 First. *Id.* at 579. And the decision in *Trans World Airlines* v. *Independent Federation of Flight Attendants*, the only cited case decided after *Chicago & North Western*, involved the treatment of replacement workers after the end of a strike, did not address Section 2 First, and said nothing to suggest that the principles established in *Chicago & North Western* have been changed in any way. 489 U.S. 426, 439-443 (1989).

In sum, it is worth emphasizing that no judge who has examined this case – not the district court, not the panel majority, not even the dissenting member of the panel – thought that Petitioner's arguments based on this Court's precedent were even worthy of mention. Thus, review is not warranted here to assure consistency with this Court's prior rulings.

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[2] *General Committee of Adjustment* v. *Missouri-Kansas-Texas R.R* 320 U.S. 323 (1943).

[3] *Virginian Ry.* v. *System Federation*, 300 U.S. 515 (1937).

II. THE PANEL'S DECISION DOES NOT "AMEND" THE RAILWAY LABOR ACT

Petitioner contends that the panel "effectively amend[ed] the RLA by judicial fiat" when it found that Section 2 First may incorporate a duty of advance notice in some circumstances. Pet. at 15. According to Petitioner, because Section 2 First does not contain an express duty of advance notice, the panel must have written it into the statute. *Id.* at 16-17.

But what Petitioner calls judicial "re-writing" is really just an application of Section 2 First that it does not like. Petitioner admits that the panel based its decision on the plain text of the statute, not some figment of judicial imagination. *Id.* at 4. In particular, the panel relied upon the statutory reference to "every *reasonable effort* . . . to settle all disputes . . . to avoid any interruption to commerce." 45 U.S.C. § 152 First (emphasis added).

As noted above, this Court has held that defining a "reasonable effort" is a "case-by-case" inquiry. *Chicago & North Western*, 402 U.S. at 577. The RLA's legislative history likewise reveals that everyone understood that the duty of "reasonable efforts" would be enforced by the courts "as necessities arise." Hearings on H.R. 7180 Before the House Comm. on Interstate and Foreign Commerce, 69th Cong., 1st Sess. 91 (1926). Thus, what constitutes a "reasonable effort" depends on the facts.

In applying the duty of Section 2 First to the facts of this case, the panel was clearly justified in concluding that advance notice may be a "reasonable effort" when a union has repeatedly engaged in surprise strikes – in derogation of the procedures mandated by the RLA – and has been repeatedly enjoined from doing so. The fact that no other court has issued such an injunction is simply because no other union in the

history of the RLA has ever before pursued such a dedicated practice of surprise strikes, without regard to legality or harm to others. The panel correctly concluded that – at least in these special circumstances – giving advance notice before engaging in more strikes is part of Petitioner's duty to make "every reasonable effort." That is not judicial amendment of the RLA; it is a reasoned application of settled law to the unusual facts of this case.

III. THE PANEL'S DECISION TURNS ON THE FACTS AND DOES NOT PRESENT ANY IMPORTANT ISSUE OF FEDERAL LAW

Petitioner argues that the decision of the panel "made a radical change in the rights and obligations of labor and management" under the RLA. Pet. at 6. In particular, Petitioner complains that the panel has vastly expanded the scope of disputes that are subject to Section 2 First, thereby requiring federal courts to police labor relations in the rail and airline industries. *Id.* at 19-21.

The panel's decision bears no such extravagant construction. The scope of Section 2 First has long been well-settled. The only real question before the panel was whether this particular injunction was a "practical" and "appropriate" means of addressing this particular pattern of illegal behavior by this particular union. *Chicago & North Western*, 402 U.S. at 577, 582.

Again, the answer to that question was driven by the facts, *i.e.*, an idiosyncratic history of serial, unlawful strikes by a union that follows a policy of "strike first, negotiate later." The remedy of ten days advance notice was specially designed to address this unique problem. Thus, the decision does not have any sweeping ramifications for American labor law or for labor relations in the rail or airline industries.

Indeed, the panel itself was careful to note the limits of its decision. After finding that Petitioner's practices violate Section 2 First, the majority stated that

> "[w]e need not, however, go as far as the District of Columbia Circuit did in concluding that *any* 'deliberate timing of a strike without prior warning' violates the statute. For purposes of the present case, we decide only that the statute forbids an ongoing, repeated practice of surprise strikes that are doomed later to be held illegal and enjoined. We need not and do not address the question whether the RLA forbids *all* surprise strikes. Nor do we need to reach the Eleventh Circuit's holding that anti-strike injunctions are appropriate any time a union's violation of a 'clear statutory provision' threatens 'interruption to commerce.'" Pet App. B at 8a-9a (citations omitted).

Similarly, there is no legitimacy to the Petitioner's dire warnings that if Section 2 First is applied outside the context of good faith bargaining, courts will be inundated with "challenges to a whole host of tactics and actions that have not previously been regulated by the RLA." Pet. at 21. The Court of Appeals made short shrift of this argument, noting that other situations wherein a union or carrier might invoke the duty of "reasonable efforts" are "readily distinguishable." Pet. App. B. at 9a. This is because

> "[Section 2 First] applies only to actions that cause 'interruption to commerce or to the operation of any carrier . . . .' The actions posited by BMWE, while they may make dispute resolution more difficult, do not, in and of themselves, interrupt commerce, while surprise strikes undeniably do. And strike prevention, not dispute resolution per se, was 'the major purpose of

Congress in passing the Railway Labor Act.' *Texas & New Orleans*, 281 U.S. at 565." *Id.*

* * * *

The decision below is in harmony with the principles uniformly applied concerning Section 2 First of the RLA. The panel expressly limited its holding to the facts: a decade-long pattern of illegal surprise strikes by a union that insists on continuing its disruptive behavior in the future. The notice injunction is a special remedy for a special case, driven by circumstances never seen before and unlikely to be seen again in the rail industry. It does not merit review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

STATUTES INVOLVED

Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, provides as follows:

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

Section 3 First (i) of the Railway Labor Act, 45 U.S.C. § 153 First (i) provides as follows:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."